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August 7, 2017

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Reply Comments; *Modernization of Media Regulation*; *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*; *Leased Commercial Acces*; *Cable Television Technical and Operational Requirements*; *Revision of the Commission's Program Access Rules*; MB Docket Nos. 17-105, 14-127, 07-42, 12-217, 12-68

Dear Ms. Dortch:

On August 4, 2017, reply comments were filed on behalf of the American Cable Association ("ACA") in the above referenced proceedings. The reply comments were timely filed, but due to an undetected word processing error, required amendment.

To ensure a complete and accurate record in the appropriate proceedings, ACA encloses an amended version of the reply comments correcting the error together with this letter for filing in the above referenced proceedings.

If you have any questions, or require further information, please do not hesitate to contact me directly.

Sincerely

Barbara Esbin

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	
Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees	)	MB Docket No. 14-127
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Cable Television Technical and Operational Requirements	)	MB Docket No. 12-217
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68

REPLY COMMENTS

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August 4, 2017

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REPLY COMMENTS

I. INTRODUCTION

The American Cable Association ("ACA") submits these reply comments in response to comments filed regarding the Public Notice ("Notice") issued by the Commission in the above-captioned proceeding.[1] In its Comments, ACA identified several Part 76 regulations affecting multichannel video programming distributors ("MVPDs") that are outdated, unnecessary, or

[1] *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105 (rel. May 18, 2017) ("Public Notice").

unduly burdensome, and therefore ripe for elimination or modification, including the Commission's performance testing obligations, related recordkeeping requirements, analog technical standards, and signal quality-specific complaint resolution process.[2] ACA also asked the Commission to review several of its recordkeeping and public inspection file rules for elimination or modification,[3] and to review the continued need for certain customer notice obligations.[4] Finally, ACA urged the Commission to eliminate Form 325 or, at the minimum, no longer sample a random number of cable systems with less than 20,000 subscribers.[5] ACA's proposals are well supported in the record, and the Commission should review the continued need for these regulations forthwith.

In these Reply Comments, ACA also addresses a variety of proposals submitted by other parties in this proceeding. First, the Commission should examine the continued need for several MVPD recordkeeping and notice requirements identified by NCTA in addition to those discussed in ACA's comments. Next, the Commission should grant NCTA's request to reduce leased access burdens on operators and to deny the United Church of Christ's ("UCC") request to override the Office of Management and Budget's ("OMB") decision disapproving of the 2008 leased access information collection requirement. Conversely, the Commission should reject NCTA's proposals to reinterpret Section 628(b) and to modify the existing attribution rules for program access and program carriage. These actions would significantly limit the ability of independent MVPDs and programmers to take advantage of essential program access and carriage protections by decreasing the scope of covered programming. Finally, the Commission

[2] *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Comments of the American Cable Association at 3-11 (filed Jul. 5, 2017) ("ACA Comments").

[3] *Id*. at 11-18.

[4] *Id*. at 18-26.

[5] *Id*. at 26-27.

should reject broadcasters' requests to allow retransmission consent and must-carry elections to be made electronically and to change the default election from must carry to retransmission consent. These changes would harm MVPDs who have relied on the existing process since the inception of the retransmission consent regime.

II. THE RECORD SUPPORTS PROPOSALS FOR THE ELIMINATION OR MODIFICATION OF SEVERAL OUTDATED AND BURDENSOME RULES GOVERNING CABLE OPERATIONS AND MVPD RECORDKEEPING, NOTICE AND FILING OBLIGATIONS

A. The Record Demonstrates That It Is Time for the Commission to Consider Eliminating or Modifying Certain Rules Related to its Cable Technical Standards and Proof-of-Performance Testing.

In its Comments, ACA asked the Commission to consider eliminating or modifying its performance testing obligations[6] and related recordkeeping requirements,[7] as well as its technical standards for analog cable systems[8] and the requirement that operators establish a signal quality-specific complaint resolution process.[9] NCTA and Verizon both also support relief in this area.

As Verizon explains, "[t]he digital transition has rendered many of the Commission's technical rules for analog cable systems outdated and largely irrelevant as a technical matter."[10] Verizon further explains how the competitive market for video programming creates strong incentives for providers to maintain high quality services.[11] In a similar vein, NCTA outlines why an intensive regulatory testing regime – adopted when cable operators were the only MVPDs in

[6] 47 C.F.R. § 76.601.

[7] 47 C.F.R. § 76.1704.

[8] 47 C.F.R. § 76.605.

[9] 47 C.F.R. § 76.1713.

[10] *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Comments of Verizon at 11 (filed Jul. 5, 2017) ("Verizon Comments").

[11] *Id*. at 11-12.

a community – is no longer justified.[12] Given these advancements in technology and the multitude of video programming options that consumers now have, rigorous technical testing standards are no longer necessary. For these reasons, the Commission should review the continued need for its performance testing obligations, related recordkeeping requirements, technical standards for analog cable systems, and the requirement that operators establish a signal quality-specific complaint resolution process.[13]

Further, Commission should examine, as NCTA requests, whether it can reduce the burdens placed on cable operators to comply with signal leakage testing.[14] Under the Commission's rules, all cable operators using aeronautical frequencies, regardless of size, must conduct signal leakage tests, fix any leaks, and report the results annually to the Commission via Form 320.[15] Although cable operators, as NCTA notes, "take seriously their obligation to protect public safety if operating in the aeronautical frequency band," there may be less burdensome methods for operators to meet this important public safety obligation.[16] ACA concurs that the Commission should examine whether the goal of protecting aeronautical safety can be achieved while at the same time reducing or eliminating unnecessary testing obligations.

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[12] *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Comments of NCTA – The Internet and Television Association at 24-25 (filed Jul. 5, 2017) ("NCTA Comments").

[13] Further, as ACA explained, cable operators generally have complaint procedures in place at the local level, and widespread, systemic signal quality issues are few and far between, making a testing and quality-specific complaint regime superfluous. ACA Comments at 10-11.

[14] NCTA Comments at 25.

[15] *See* 47 C.F.R. §§ 76.614; 76.1803.

[16] NCTA Comments at 25.

B. There Is Industry Consensus that the Commission Should Review its Recordkeeping and Public Inspection File Requirements for Elimination or Modification.

In its Comments, ACA requested that the Commission review several recordkeeping and public inspection file rules, including the requirement to maintain a hard copy of Part 76,[17] the Equal Employment Opportunity ("EEO") website posting requirement,[18] the requirement to maintain a current channel lineup at a local system office,[19] and the amount of information cable operators must denote on their lists of must-carry signals carried.[20] In addition, ACA urged the Commission to investigate potential relief for cable operators from the burdens of demonstrating compliance with the children's advertising limits.[21] ACA is not alone in identifying the need to eliminate unnecessary, outdated or burdensome public inspection file requirements.

As NCTA asserts, the cable public inspection file requirements are long overdue for a substantive review.[22] NCTA specifically requests that the Commission review the requirements to maintain a current channel lineup in the public file,[23] to include a list of must-carry signals carried,[24] to post documentation in the public file demonstrating compliance with the children's advertising limits (rather than responding only in case of a complaint),[25] and to post the EEO public file on an operator's website,[26] public inspection file obligations that ACA also requested

[17] 47 C.F.R. § 76.1714.

[18] 47 C.F.R. § 76.1702.

[19] 47 C.F.R. § 76.1705.

[20] 47 C.F.R. § 76.1709.

[21] 47 C.F.R. § 76.1703.

[22] NCTA Comments at 26-30.

[23] *Id*. at 27.

[24] *Id*.

[25] *Id*. at 28.

[26] *Id*. at 28-29.

the Commission review.[27] Verizon even went a step further and argues that the obligation to maintain a public inspection file has long outlived its usefulness and the public file itself should be eliminated.[28] In short, there is widespread support for review of the public inspection file rules identified by ACA in its Comments.

The Commission should also take up NCTA's suggestion to reverse its recent decision to require small systems with more than 1,000 but fewer than 5,000 subscribers to upload documents to their online public inspection files that were previously only required to be made available to the public "upon request."[29] In its 1999 decision to provide a targeted exemption to systems within that size range,[30] the Commission characterized its actions as an attempt to "provide regulatory relief to a greater number of small cable systems while ensuring that the public continues to have access to important public file information."[31] In 2001, the Commission further clarified that systems with more than 1,000 but fewer than 5,000 subscribers need not maintain these records at a particular site, provided that they are made "promptly available once a request is received."[32] Nonetheless, when promulgating its rules obligating cable systems to maintain their public inspection files in the Commission's online-hosted database, over the

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[27] ACA Comments at 12-18.

[28] Verizon Comments at 6-8.

[29] NCTA Comments at 29. *See also Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Report & Order, 31 FCC Rcd 526, ¶ 49 (2016) ("2016 Online Public File Order") ("We disagree with NCTA that moving from an 'upon request' regime to an affirmative requirement to upload documents to the online file for these systems represents a burdensome change in regulation.").

[30] *1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Report and Order, 14 FCC Rcd 4653, ¶ 25 (1999) (requiring systems with more than 1,000 subscribers but fewer than 5,000 subscribers to provide sponsorship identification, EEO records, commercial records for children's programming, proof-of-performance test data, and signal leakage logs and repair records only upon request).

[31] *Id.*

[32] *1998 Biennial Regulatory Review – Streamlining of Cable Television Service Party 76 Public File and Notice Requirements*, Second Report and Order, 16 FCC Rcd 19773, ¶ 5 (2001).

strong objections of ACA[33] and others, the Commission removed this exemption, believing that requiring that these records be maintained in a cable system's online public file did not "materially alter the burden" of maintaining the files.[34]

There is no question that an affirmative obligation to maintain documents in a public inspection file is more burdensome than only needing to produce the records upon request.[35] Regularly posting any information online is most burdensome for operators, and the Commission's reasoning behind providing regulatory relief to small cable systems in 1999 should apply doubly with respect the online public inspection file. Restoring this relief granted previously to systems with more than 1,000 but fewer than 5,000 subscribers would alleviate an unnecessary burden placed most often on smaller operators that tend to operate systems of this size. The Commission should consider this, and other relief requested by ACA and others, when reviewing the public inspection file and recordkeeping requirements for elimination or modification, particularly ACA's request that the Commission raise the cutoff for the small system exemption from systems serving fewer than 1,000 subscribers to systems serving fewer than 2,500 subscribers to reflect changes in the marketplace since the exemption was first adopted.[36]

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[33] *See Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14-127, Comments of the American Cable Association at 10-14 (filed Mar. 16, 2015) ("ACA Online Public File Comments"); Reply Comments of the American Cable Association at 6 (filed Apr. 14, 2015).

[34] 2016 Online Public File Order, ¶ 49.

[35] *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14-127, Comments of the National Cable & Telecommunications Association at 15 (filed Mar. 16, 2015) ("[M]oving from an 'upon request' regime to an affirmative requirement to upload documents to the Commission's online public file would be a burdensome, material change in regulation.").

[36] ACA Online Public File Comments at 7-10.

C. The Record Supports Commission Review of Multiple Outdated Customer Notification Requirements.

In its Comments, ACA invited the Commission to review the continued need for certain customer notice obligations, including the categories of content that cable operators must provide subscribers annually,[37] basic tier availability notices that must be provided at installation,[38] and notices of equipment compatibility.[39] ACA also requested that the Commission eliminate its regulation requiring DTV transition notices.[40]

Commenters from all industry segments – cable operators and broadcasters alike – agree that the Commission should minimize the number of required notices and, where appropriate, permit regulated entities to use electronic means to fulfill their notice obligations.[41] As reducing unnecessary notices is unanimously supported by commenters, the Commission should conduct the reviews requested by ACA.

ACA also supports NCTA's request that the Commission review several other customer notice requirements,[42] including the requirement that cable operators' give customers 30 days advanced written notice of any significant changes in the information contained in their annual

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[37] 47 C.F.R. § 76.1602.

[38] 47 C.F.R. § 76.1618.

[39] 47 C.F.R. §§ 76.1621; 76.1622.

[40] 47 C.F.R. § 76.1630.

[41] *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Comments of Nexstar at 15 (filed Jul. 5, 2017) ("Nexstar Comments") ("The Commission should streamline local public notice requirements to better account for how viewers consume information in 2017 and beyond."); Comments of the National Association of Broadcasters at 20, 21 (filed Jul. 5, 2017) ("NAB Comments") ("At the very least, the FCC should permit broadcasters to place any requisite notices that today must be published in a local newspaper on their station websites.") ("Because the "Internet has become a fundamental part of consumers' daily lives and now represents the medium used most by the public to obtain information instantaneously," the FCC similarly should bring its public notice rules into "alignment with current consumer expectations" and permit online posting of notices consistent with its prior decision on licensee-conducted contests."); NCTA Comments at 4-9 (identifying notices that are ripe for elimination or revision); Verizon Comments at 6-8 (calling for elimination of the public file requirement).

[42] NCTA Comments at 4-10.

notices,[43] the requirement that cable operators give customers 30 days advanced written notice to both customers and local franchise authorities of any rate or service change,[44] and the requirement that that cable operators notify all subscribers in writing of certain charges for changes in service tiers.[45]

Furthermore, ACA agrees with NCTA that, at a minimum, the Commission should clarify that the written notice requirement as it pertains to these provisions can be satisfied via electronic notice. Although it would not be appropriate in all circumstances to substitute electronic notice for notification via traditional methods, such as certified mail, in the instances contained in the above provisions,[46] electronic notification would provide welcomed relief to cable operators and other entities from paperwork burdens. If the Commission decides not to eliminate these notice requirements, then at a minimum, it can still reduce paperwork burdens by clarifying that written notice may be satisfied via electronic means.

D. The Commission Should Eliminate Form 325 and Also Review Ways to Reduce Burdens on Cable Operators in Collecting Form 333 Information.

In its Comments, ACA explained why Form 325 was outdated, unnecessary and potentially burdensome for smaller operators, and suggested that the Commission eliminate it or, at a minimum, no longer sample a random number of cable systems with less than 20,000 subscribers.[47] This suggestion is well supported in the record.

As ACA explained, Form 325 requires cable operators, on a system-by-system basis, to provide the Commission with a lot of basic information that is publicly available or otherwise

[43] 47 C.F.R. 1603(b).

[44] 47 C.F.R. 1603(c).

[45] 47C.F.R. 1604.

[46] 47 C.F.R. §§ 76.1602, 76.1603(b) & (c), 76.1604, 76.1618; 76.1621, 76.1622, 76.1630.

[47] 47 C.F.R. § 76.403.

provided to the Commission via other required filings.[48] NCTA and Verizon both, likewise, explain that the information the Commission collects via Form 325 has little utility.[49] NCTA explains, in line with ACA's Comments, that most of the information collected via Form 325 is available from other sources and no longer makes sense in today's competitive environment.[50] Verizon as well notes that Form 325 requires "cable systems to report information that is of little relevance in today's competitive video market place."[51] This is likely because, as Verizon astutely observes, the Commission has not reviewed the relevance and need for the information collected on Form 325 since 1999.[52] In the interest of clearing out the regulatory underbrush, it is time for the Commission to conduct such a review, determine that it is no longer necessary to collect the information, and eliminate Form 325.

Along these lines, ACA supports NCTA's request for the Commission to explore less burdensome ways to obtain the data it needs to meet its statutory requirement to annually publish a statistical report on average cable rates.[53] To satisfy its statutory obligation, the Commission surveys a random sample of cable operators annually via Form 333, which seeks information on service and equipment charges, subscriber numbers, channels offered, channel lineups, and the availability of advanced services.[54] Although some of the information reported on Form 333 serves important purposes, especially as it relates to the total amount paid to local

[48] ACA Comments at 27.

[49] NCTA Comments at 29-30; Verizon Comments at 17-18.

[50] NCTA Comments at 30.

[51] Verizon Comments at 17.

[52] *Id*.

[53] *See* 47 U.S.C. § 543(k).

[54] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Order, 32 FCC Rcd 2984 (2017).

broadcasters in retransmission consent fees and the number of cable subscribers that form the basis of annual retransmission consent payments, as with Form 325, cable operators must devote significant resources to completing Form 333. As NCTA points out, the Government Accountability Office and the Media Bureau have both stated that less frequent reporting could reduce burdens on operators without harming the Commission's ability to fulfill its statutory obligations.[55] Accordingly, the Commission should review whether there are alternative ways to obtain the data that would impose fewer burdens on cable operators, particularly data that is publicly available or no longer needed by the Commission to meet its statutory obligation.[56]

III. THE COMMISSION SHOULD REJECT BROADCASTER PROPOSALS TO ALLOW RETRANSMISSION CONSENT ELECTIONS TO BE MADE ELECTRONICALLY

In their Comments, CBS, Walt Disney, 21st Century Fox and Univision (the "Joint Broadcasters"), along with Nexstar and NAB, ask the Commission to revise its retransmission consent notice rules and allow broadcasters to notify MVPDs of their retransmission consent or must-carry elections via electronic means.[57] Nexstar further claims that the Commission should amend the default election from must carry to retransmission consent.[58] The Commission should reject these requests.

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[55] NCTA Comments at 23, *citing* U.S. Gov't Accountability Office, *Video Marketplace: Competition is Evolving and Government Reporting Should be Reevaluated* at 33 (2013), *available at* http://www.gao.gov/products/GAO-13-576; *FCC Seeks Public Comment on Report on Process Reform*, Public Notice, 29 FCC Rcd 1338 (2014).

[56] The Commission's recently adopted Form 477 Further Notice of Proposed Rulemaking is an example of the Commission's initiative to examine "how it can reduce burdens on industry by eliminating unnecessary or onerous data filing requirements." *FCC Proposes Improvements to Broadband & Voice Services Data Collection*, Press Release, FCC 17-103 (rel. Aug. 3, 2017). ACA encourages a similar review of the Form 325 and 333 data collections.

[57] *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Comments of CBS Corporation, The Walt Disney Company, 21st Century Fox, Inc., and Univision Communications Inc. at 10-12 (filed Jul. 5, 2017) ("Joint Broadcaster Comments"); Nexstar Comments at 16-18; NAB Comments at 22-23.

[58] Nexstar Comments at 16.

Under Section 325 of the Communications Act and the Commission's regulations, commercial broadcast stations must elect must carry or retransmission consent every three years, by October 1 of the applicable triennial period, for each cable system in their local market.[59] Commission regulations also establish specific procedures by which a local commercial broadcast station must choose carriage under retransmission consent or must carry for each three-year cycle. In particular, commercial broadcast stations must notify cable systems of their election via certified mail and place a copy of each election in their online public inspection file.[60] Commission regulations also require that a commercial broadcast station make consistent elections within a franchise area.[61]

Broadcast interests in this proceeding claim that this process needs to be reformed. As an example, the Joint Broadcasters claim that the retransmission consent election process generates significant paperwork burdens and is onerous because stations must make an election via certified mail on a system-by-system basis.[62] NAB, likewise, claims that sending elections via certified mail and having to place copies in the public inspection file is antiquated and unnecessarily burdensome.[63] Finally, Nexstar claims that election notices sent via email "would be faster, more efficient, and more easily verifiable."[64]

The Commission should reject requests to permit broadcasters to notify cable operators of their retransmission consent or must-carry election via electronic means. In focusing on updating a process claimed to be "antiquated" and "burdensome," broadcasters overlook the

[59] 47 U.S.C. § 325(b). 47 C.F.R. § 76.64.

[60] 47 C.F.R. § 76.1608; 47 C.F.R. §§ 76.1700(a)(6), 76.1709.

[61] 47 C.F.R. § 76.64(g).

[62] Joint Broadcaster Comments at 10-11.

[63] NAB Comments at 22.

[64] Nexstar Comments at 17.

key fact that a broadcast station's election of retransmission consent or must carry triggers legal consequences for cable operators and broadcasters alike.[65] Although it is not disputed that broadcasters and cable operators can (and do) communicate through electronic means, whether a broadcaster elects retransmission consent or must carry – and the cable operators ensuing obligation for carriage of those signals or negotiation for carriage – is too significant for the parties involved not to be delivered via certified mail. Obligating commercial broadcast stations to send their election notice via certified mail and place a copy in their public inspection file appropriately documents whether the broadcaster is choosing to trigger its statutory right to carriage or whether the broadcaster prefers to be voluntarily carried via a written agreement. It therefore made sense, and continues to make sense, to require broadcasters to make their elections via proven means of distribution (i.e., certified mail) and to place copies in their public inspection file. Email delivery, in contrast, offers no such guarantees, despite Nexstar's claim that a "bounce back" if an email address is incorrect is more easily verifiable,[66] while shifting significant burdens onto MVPDs to determine whether an election has properly been made. Also, contrary to broadcasters' claims, any paperwork burdens generated by these minimal requirements are far outweighed by the benefits for a smooth, compliant election cycle for all parties, given the tremendous significance of the election for MVPDs and their subscribers. The Commission must take account of the costs that broadcasters and cable operators would incur to resolve disputes before the Commission over whether a broadcaster made a timely

[65] As the Commission has recognized, "cable systems are presumptively required to carry all local television stations in all television markets they serve." *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd 14254, ¶ 3 (2008), *citing Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993) ("Cable Must-Carry Order"). *See also Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994).

[66] Nexstar Comments at 17.

notification via email. These costs are significant, particularly in relation to the marginal cost of sending a letter via certified mail once every three years.[67]

Furthermore, the Commission should summarily reject Nexstar's request to amend its rules so that the default election becomes retransmission consent rather than must carry. Nexstar argues that after 1992, electing retransmission consent reflected a departure from the status quo, while today, most broadcast stations elect retransmission consent.[68] In its Orders implementing the 1992 Cable Act, the Commission recognized that must carry can be self-executing. In other words, making must carry the default election allows a cable operator, "if necessary, [to] proceed to retransmit a local television signal without interaction with the broadcaster."[69] This fact remains true today. It is also true that retaining must carry as the default election will help those smaller broadcasters who have historically elected to assert their mandatory carriage rights. These broadcasters, who often have limited resources, are not harmed by their failure to give timely notice because they maintain their must carry rights regardless of whether they provide timely notice. With a change in the default election, a broadcaster that does not provide notice on time would forfeit their must carry rights and be forced to expend administrative and financial resources to negotiate and sign a contract to expressly grant retransmission consent in order to maintain carriage on a cable operator's system.

Moreover, both cable operators and broadcasters have relied on the current election system for decades. Small entities – both broadcasters and cable operators – who may not pay

[67] In 2017, the cost to send a letter via certified mail is $4.61 if the sender requests electronic delivery confirmation and $6.59 if the sender requests a traditional return receipt. *See* https://www.certifiedmaillabels.com/usps-postal-rates/.

[68] Nexstar Comments at 17-18.

[69] Cable Must-Carry Order, ¶ 159.

close attention to the happenings in Washington could be significantly harmed if they are not made aware of such a dramatic change. Under the Commission's rules, such a "default" election triggers a broadcaster's statutory right to insist on mandatory carriage, and ensures that the broadcast station is carried by the cable operator. Nexstar has offered no compelling justification for its request and the Commission should decline to take it up.

IV. THE COMMISSION SHOULD REDUCE LEASED ACCESS BURDENS ON CABLE OPERATORS AND REJECT UCC'S REQUEST TO OVERRIDE OMB DISAPPROVAL OF PREVIOUSLY ADOPTED LEASED ACCESS INFORMATION COLLECTIONS

In its Comments, NCTA requests that the Commission take measures to ensure that "implementation of the leased access provisions is consistent with [the Commission's] obligation to ensure that the 'price, terms, and conditions of such use will not adversely affect the operation, financial condition, or market development of the cable system.'"[70] In particular, NCTA asks that the Commission reexamine certain regulatory policies that force cable operators to incur unrecoverable leased access costs.[71] ACA agrees. The Commission should take steps to reduce the burdens that its leased access rules place on cable operators.

Though providing leased access is a statutory obligation, the Commission can better adjust the costs of compliance so that cable operators, especially smaller operators, are not unduly burdened. Specifically, the Commission should examine how leased access requests force operators to expend unrecoverable costs to gather data and respond to requests and adjust its rules accordingly. In today's digital world, especially with the advent of the Internet and social media, leased access has long outlived its stated purpose of promoting "competition in the delivery of diverse sources of video programming" and assuring that "the widest possible

[70] NCTA Comments at 18.

[71] *Id*.

diversity of information sources are made available to the public."[72] ACA therefore agrees that the Commission should allow all operators to reply only to "bona fide" leased access requests and lengthen the permitted response time to 45 days when a "bona fide" request relates to multiple systems.[73] The Commission should also help operators, especially smaller operators, defray the costs needed to respond to leased access inquiries by permitting operators to require a deposit or application fee.[74] By taking these steps, the Commission would thus provide relief for operators who are already resource-constrained and overburdened by various statutory and regulatory requirements.

In addition, the Commission should also take this opportunity to deny UCC's request to override OMB's decision disapproving of the 2008 leased access information collection requirements.[75] As NCTA explains, the Sixth Circuit Court of Appeals has stayed the Commission's 2008 leased access decision for nearly ten years, but continues to hold the underlying case in abeyance until UCC's request has been resolved.[76] ACA supports the reasons NCTA outlined in support of its Opposition to the UCC Request years ago, and encourages the swift and expedited resolution of this request.[77]

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[72] *See* 47 U.S.C. § 532(a).

[73] NCTA Comments at 18-19.

[74] *Id*. at 19.

[75] *See* United Church of Christ, *Request to Override the Action of the Office of Management and Budget and to Modify the Commission's Report & Order*, MM Docket. No. 07-42 (filed Aug. 26, 2008).

[76] NCTA Comments at 18-19.

[77] NCTA cites to its Sep. 2008 Opposition for the reasons behind its opposition today. *See Leased Commercial Access*, MB Docket No. 07-42, National Cable & Telecommunications Association Opposition to Request to Override the Action of the Office of Management and Budget and to Modify the Commission's Report and Order (filed Sep. 5, 2008). In its Opposition, NCTA described why OMB's action was justified based on the record before it, and that modifying the rate formula as proposed by UCC would only compound the violations of the Administrative Procedure Act that OMB had already found had occurred. *Id.*

V. THE COMMISSION SHOULD REJECT SUGGESTIONS THAT IT REVISIT AND CONTRACT ITS INTERPRETATION OF THE SCOPE OF THE PROGRAM ACCESS PROVISION

In its comments, NCTA suggests that the Commission should revisit its interpretation of the program access provision of the statute – Section 628 – "and restore it to its proper scope, meaning, and intent."[78] NCTA reasons that the Commission's broad reading of Section 628(b) as covering acts or practices that hamper the ability of MVPDs to compete in general, rather than those that hamper only their ability to obtain satellite-delivered programming, strays from Congress's intent in enacting the program access provision and should be revisited, particularly in light of increased competition in the MVPD marketplace.[79] ACA respectfully disagrees, for several reasons.

First and foremost, NCTA's request is inapposite to the purpose of this media modernization initiative, which is aimed at providing the Commission with actionable suggestions for launching rulemaking proceedings to clear the regulatory underbrush of outdated, unnecessary and unduly burdensome regulations (the regulatory "underbrush") that have exceeded their usefulness and whose public interest aims can be achieved more efficiently.[80] Although the Public Notice asked commenters to identify specific rules which should be modified or repealed and explain how the rule or rules should be modified or

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[78] NCTA Comments at 13.

[79] NCTA Comments at 11-13 (rather than concentrating narrowly on agreements that hinder MVPDs from providing cable-affiliated satellite programming, the FCC has expanded the reach of the statute to cover agreements that hinder the ability of MVPDs to provide any programming to consumers – that is to compete – in effect transforming Section 628(b) "into a mini-antitrust law").

[80] *See* Public Notice at 1 ("The objective of this proceeding is to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome. By initiating this review, the Commission takes another step to advance the public interest by reducing unnecessary regulations and undue regulatory burdens that can stand in the way of competition and innovation on media markets."). *See also* Remarks of FCC Commissioner Michael O'Rielly Before the Free State Foundation's Tenth Anniversary Luncheon (Dec. 7, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1207/DOC-342504A1.pdf (discussing efforts in the upcoming year to clear regulatory underbrush).

repealed, NCTA does not ask that the Commission eliminate or modify any particular rule it has adopted under Section 628(b) on the grounds it is outdated or unnecessary or burdensome, it seeks revocation of a settled matter of statutory interpretation because it continues to believe it erroneous.[81] Rather than recommend changes to "modernize" the Commission's media rules, the relief NCTA seeks would simply turn back the clock to a more favorable time for cable-affiliated programmers by contracting the scope of Section 628(b) protections and potentially up-end program access protections that are critical to ensuring the continuation of existing MVPD competition and enabling additional competitive entry into MVPD markets. It is difficult to see how a statutory re-interpretation that, for example, eliminates program access protections benefitting competitors by ensuring competition and fair and non-discriminatory access to terrestrially-delivered cable programming can satisfy the Commission's goals with this initiative.

Second, the request is inappropriate. What NCTA seeks here is re-litigation of a settled question of statutory interpretation which it unsuccessfully pursued in court relatively recently.[82] Specifically, NCTA questions the continued wisdom of the agency's decade-old interpretation of

[81] *See* Public Notice at 1.

[82] *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (upholding the Commission's interpretation of Section 628(b) as authorizing a rule prohibiting cable operators from entering into exclusive contracts with multiple dwelling unit ("MDU") building owners on grounds that contracts hindering the ability of competing MVPDs to provide any programming to consumers in MDU buildings hinder those MVPDs from providing satellite cable programming). The Commission's broad interpretation of the statute was later applied to reach exclusive programming contracts involving terrestrially delivered cable programming (such as regional sports networks) on the grounds that such contracts could so impair the competitive ability of an MVPD that they could not compete in the provision of any programming. *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Further Notice of Proposed Rulemaking and Order on Reconsideration, 25 FCC Rcd 746, ¶¶ 3, 11 (2010). Once again, the Commission's interpretation was upheld against a challenge brought by NCTA member Cablevision Systems Corp. *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (rejecting claims that the Commission's interpretation was inconsistent with the text, structure and legislative history of Section 628(b) given Congress's failure to choose its language to limit the Commission to regulating the evil of program hoarding alone; to the extent there is any ambiguity over congressional intent to allow regulation of exclusivity contracts along with unfair dealing over programming, the Commission reasonably resolved that in favor of its own interpretation).

its governing statute, a question that is far afield from the purpose of this initiative – clearing the underbrush. Yet NCTA presents no new facts or analysis to support a decision to re-open, as a general matter, the Commission's settled interpretation of the scope of its authority to implement protections against unfair methods of competition or unfair or deceptive acts and practices under Section 628(b).[83]

Finally, ACA does not believe that a rulemaking focused on re-examining the scope of the Commission's authority under Section 628(b) is wise or warranted. It would be unwise to launch a new rulemaking to consider in isolation whether to narrow the scope of the Commission's authority under Section 628(b) because it would upend many existing rules and regulations that depend on the current interpretation with no showing those rules are no longer necessary in the public interest. Moreover, such a narrow rulemaking would conflict with an existing rulemaking. The Commission currently has before it a pending rulemaking in which ACA, and doubtless others, remain interested involving matters that rest in part on the Commission's existing interpretation of the scope of its authority under Section 628(b).[84]

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[83] Presumably, if NCTA had new insights into the meaning of the words of the statute, the structure of the Act, or had come across something more in the legislative history to better support its preferred interpretation of the statute, it would have been mentioned them in its comments.

[84] *Revision of the Commission's Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et. al.; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 27 FCC Rcd 12605 (2012); *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Comments of the American Cable Association (filed Dec. 14, 2012) ("ACA Program Access FNPRM Comments); Reply Comments of the American Cable Association (filed Jan. 14, 2013) ("ACA Program Access FNPRM Reply Comments"). Specifically, the Commission has sought comment upon, and ACA has supported, use of rebuttable presumptions in program access cases challenging exclusive contracts under Section 628(b), including rebuttable presumptions that an exclusive contract for a cable-affiliated regional sports network ("RSN") (regardless of whether it is satellite- or terrestrially-delivered) is an "unfair act" under Section 628(b) and establishment of comprehensive stand-still relief pending resolution of program access complaints concerning an RSN (regardless of whether it is satellite- or

Initiating a new, unrelated limited proceeding to narrow the scope of its authority would be procedurally inappropriate and in no way advance the public interest.

A broad new rulemaking is also unnecessary. The Commission recently launched an inquiry regarding broadband access to multiple tenant environments in which the Commission has asked, at NCTA's suggestion, whether it should revisit its determination that Section 628(b) extends to matters that do not explicitly involve access to satellite-delivered cable programming.[85] Presumably, in that context, should the Commission commence a rulemaking proceeding, it will limit the scope of any ruling to the narrow question before it, whether Section 628(b) protections extend beyond triple play video, voice and broadband Internet providers, a matter it has previously addressed and has been settled by the courts, to also cover broadband-only providers. Thus, the need for a separate and far broader examination in the context of the Commission's Media Modernization Initiative to address this aspect of the relief sought by NCTA is far from evident.[86]

terrestrially-delivered; adoption of a rebuttable presumption that standstill relief is warranted pending resolution of complaints involving exclusive RSN contracts (regardless of whether it is satellite- or terrestrially-delivered) and certain related relief. Additionally, ACA proposed adoption of a categorical determination that discrimination by a cable-affiliated programmer with respect to any terrestrially delivered programming categorically satisfied the "unfair act' standard of Section 628(b). See ACA FNPRM Comments at 26-62; ACA FNPRM Reply Comments at 31-70.

[85] See *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, ¶ 18, n.47 (rel. June 23, 2017), *citing* NCTA, June 15, 2107 Ex Parte Letter at 2 (suggesting that the Commission consider asking some questions in addition to those reflected in the draft NOI released on Jun. 1, 2017, FCC-CIRC1706-05, including, "Should the Commission revisit whether its determination that Section 628(b) (the "program access" provision of the 1992 Cable Act) extends to matters that have nothing to do with access to satellite-delivered cable programming is consistent with public policy and the intent of Congress?"). If the Commission were not potentially considering narrowing the scope of its interpretation, presumably it would not have taken up NCTA's suggestion by adding that question to its inquiry.

[86] To the extent NCTA remains unhappy with the Commission's exercise of authority over terrestrially-delivered cable programming, it can file a petition for rulemaking laying out grounds for re-opening the 2007 rulemaking.

In addition, taking NCTA up on its suggestion here would be highly controversial and not in keeping with the overall aims of the Commission's modernization initiative to remove regulatory underbrush to "better promote the public interest and clear a path for more competition, innovation, and investment in the media sector."[87] The Commission has been presented with a plethora of worthy suggestions in this docket to date, including those presented by ACA, NCTA and others that are far more deserving of the attention and resources of the Commission and it can better serve the public interest by focusing on those.

VI. CHANGE TO THE COMMISSION'S CABLE ATTRIBUTION RULES FOR PROGRAM CARRIAGE AND ACCESS PURPOSES IS NOT WARRANTED

The Commission should reject NCTA's suggestion to relax the attribution rules as they pertain to program access and program carriage, as it would limit the scope and availability of those protections at a time when cable operators and video programmers are increasingly pursuing vertical integration and there remain financial incentives for vertically integrated entities to discriminate against competing MVPDs and programming networks.[88]

NCTA specifically proposes that the Commission eliminate the inclusion of nonvoting and insulated limited partnership and LLC equity interests of five percent when determining an MVPD's attributable or cognizable interest in a satellite cable programming vendor.[89] NCTA fails to explain why this particular type of ownership should be treated any differently than other

[87] Public Notice, Statement of Chairman Ajit Pai.

[88] As discussed previously, it would be unfair for the Commission to launch a new rulemaking to re-evaluate its program access attribution standard when it has still pending before it from 2012 a further rulemaking proceeding in which ACA remains interested, that was launched, inter alia, to update the Commission's program access rule's definition of a buying group to reflect current marketplace practices and expectations. *See infra* Section V.

[89] NCTA Comments at 17-18. *See* 47 C.F.R. § 76.501 (establishing a 5% cognizable interest to determine cable cross-ownership); 47 C.F.R. § 76.1300(b) (defining "attributable interest" in the context of program carriage as including voting or nonvoting stock or limited partnership equity interests of 5% or more); 47 C.F.R. § 76.1000(b) (defining "cognizable and attributable interest" in the context of program access as including voting or nonvoting stock or limited partnership equity interests of 5% or more).

types of equity ownership interests. It also fails to explain why making this narrow modification to the attribution rules should be prioritized by the Commission over other possible modifications. Instead NCTA makes a broader case that changes in the programming marketplace have lessened the need for program access rules, and that even programming networks that are wholly owned by competing MVPDs have no incentive to withhold programming.[90]

The Commission should reject this thinly-supported request, which, regardless of the merits, is well outside the scope of this proceeding. Nothing presented by NCTA suggests that the existing attribution standard is no longer necessary to deter specific discriminatory or improper conduct by cable operators or programmers with respect to access to cable-affiliated programming by other MVPDs or a fair chance at cable carriage by independent programmers.[91] Although NCTA compares the attribution rules for program access and program carriage to the cable ownership rules, which do not include nonvoting and insulated limited partnership and LLC equity interests of five percent when determining an MVPD's attributable or cognizable interest in a satellite cable programming vendor, the Commission very purposefully adopted a standard for program access and program carriage "to deter specific improper practices as well as to promote competition and diversity."[92] The Commission determined that five percent of either voting or nonvoting stock held by a single entity and

[90] NCTA Comments at 17.

[91] In the unlikely event the Commission finds change to the cable attribution rules for program carriage purposes is warranted, it should create a separate attribution standard for program carriage and leave the attribution standard for program access purposes untouched.

[92] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules*, Notice of Proposed Rulemaking, 13 FCC Rcd 12990, ¶ 2 (1998). The Commission also acknowledges that this attribution standard is in line with Congress's purpose in adopting Section 628 of the 1992 Cable Act to curb "certain incentives to influence the behavior of affiliates to the detriment of competitors." *Id.,* ¶ 6.

inclusion of limited partnership interests regardless of insulation would be consistent with its attribution standard for video dialtone ownership and set "an appropriate threshold for identifying the point at which ownership in a publicly traded entity may create the potential for influence or control."[93]

ACA does not dispute NCTA's claim that the video programming marketplace has changed. However, neither the availability of independent programming nor competition in the programming marketplace undercut the basis for the Commission's decision to include nonvoting and insulated limited partnership and LLC equity interests as attributable ownership interests. NCTA claims that "competition among MVPDs and other sources of video programming have greatly diminished the risk that MVPDs would or could profitably sacrifice the competitive attractiveness of their video service to consumers,"[94] but marketplace realities suggest that continued vigilance is warranted. Increased vertical integration of cable and MVPD distribution and cable programming networks,[95] make this a particularly inapt time to consider

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[93] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶¶ 26, 31-32 (1993), *citing Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, ¶ 71 (1992). The Commission adopted a parallel attribution standard for the program carriage rules based on a similar rationale. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, ¶ 19 (1993).

[94] NCTA Comments at 17.

[95] Thomas Gryta, Keach Hagey, Dana Cimilluca and Amol Sharma, *AT&T Reaches Deal to Buy Time Warner for $85.4 Billion*, THE WALL STREET JOURNAL, Oct. 22, 2016 (combining Time Warner's marquee cable programming networks with AT&T's nationwide direct broadcast satellite MVPD and wireline MVPD assets); Joe Flint and Sarah Rabil, *Cable Deal Bets on Comfort-Food TV*, THE WALL STREET JOURNAL, Aug. 1, 2017 (John Malone "has long called for consolidation among content providers"). The ownership and positional interests of John Malone in Liberty Media, Liberty Puerto Rico, Charter and Discovery render Discovery's suite of cable programming networks subject to the program access rules. Assuming no dilution of these attributable ownership interests, the Scripps cable programming networks will come under program access protections for the first time, upon consummation of the Discovery-Scripps deal. Other tie-ups are also likely in the offing, as cable programmers facing dwindling audience shares and advertising revenues look to better position themselves by either increasing scale or combining with

relaxation of important program access and carriage protections. Moreover, "must have" cable programming continues to exist in the marketplace, particularly regional sports networks,[96] and cable operators that own such programming have the incentive and ability to foreclose access to or discriminate against their MVPD rivals, harming competition in the marketplace and consumers who, as a result, pay more for their MVPD service than they should.

Traditional MVPDs continue to depend on program access protections to temper the proclivities and abilities of cable-affiliated programmers to raise the costs of rival MVPDs in bilateral negotiations. Altering the program access attribution standard that the Commission has historically recognized as conferring sufficient influence or control over program access negotiations or program carriage decisions would significantly diminish protections for other MVPDs under the program access rules and for independent programmers under the program carriage rules.[97]

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distribution platforms. See Richard Greenfield, BTIG Research, #goodluckbundle Driving Media Industry Exi[t]s and Consolidation; What's Next?, Aug. 2, 2017, http://www.btigresearch.com/2017/08/02/goodluckbundle-driving-media-industry-exists-and-consolidation-whats-next/. Now is simply not the time to consider relaxation of the program access attribution standard.

[96] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensee*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 57 (2011) ("We are particularly concerned about the anticompetitive possibilities arising from bundling of marquee programming. According to our analysis, Comcast-NBCU's marquee programming includes at least its broadcast programming, its RSN programming, and its broad portfolio of national cable programming.").

[97] Although ACA focuses these comments on the impact change in the attribution standard would have for program access purposes, ACA has demonstrated in other contexts that the interests of independent programmers and operators are aligned in their desire to offer subscribers a diverse array of programming choices without interference by large, vertically integrated MVPDs and programming conglomerates. *See Promoting the Availability of Diverse and Independent Sources of Video Programming,* MB Docket No. 16-41, Joint Comments of the American Cable Association, MAVTV Motorsports Network, One America News Network and AWE, and RIDE TV (filed Jan. 26, 2017); Joint Reply Comments of the American Cable Association, MAVTV Motorsports Network, One America News Network and AWE, and RIDE TV (filed Feb. 22, 2017). Nothing in the record in that proceeding suggests a lessened need for the full scope of program carriage protections available today.

VII. CONCLUSION

The record supports the Commission reviewing, eliminating or modifying the regulations identified by ACA in its Comments. Moreover, the Commission should address the additional proposals discussed by ACA in these Reply Comments and either conduct the reviews requested or deny the relief sought.

Respectfully submitted,

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